IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 338 of 2005

For Approval and Signature:

HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

CHHELABHAI MOTIBHAI BHARWAD

Versus

STATE OF GUJARAT

Appearance:

1. Special Criminal Application No. 338 of 2005

MR CB DASTOOR for Petitioner No. 1

PUBLIC PROSECUTOR for Respondent No. 1

RULE SERVED BY DS for Respondent No. 2

CORAM : HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 13/05/2005

ORAL JUDGEMENT

1. Learned Advocate for the applicant Mr.Dastoor

tenders a xerox copy of the judgment of Appellate Court. The said copy is taken on record.

2. By way of filing this application the petitioner has challenged the order passed by the Sub-divisional Magistrate, Surendranagar in exercise of powers conferred upon him under Section 56(a) of the Bombay Police Act, 1951 to extern the petitioner for two years from the district of Surendranagar and other contiguous districts of Rajkot City, Rajkot (Rural), Ahmedabad (Rural) and Bhavnagar district. The petitioner challenged the said order of Sub-divisional Magistrate, which is delivered on 25th of August, 2004, before the Appellate Authority under Section 60 of the Bombay Police Act, 1951, but vide order dtd.16.03.2005, the said appeal came to be dismissed by the Appellate Authority. Hence, both the above orders are challenged in this petition.

3. The facts of the case indicate that on 15th of April, 2004, Sub-divisional Magistrate, Surendranagar issued a show-cause notice against the petitioner in pursuance of Section 59(1) of the Bombay Police Act, 1951. Apparently, the Sub-divisional Magistrate, Surendranagar exercised powers under Section 56(a) of the Bombay Police Act, 1951 as mentioned in the said show-cause notice itself. The Sub-divisional Magistrate in the said notice took two crimes in consideration, first being C.R.No.68/2002 filed against the petitioner for the offences punishable under Sections 323, 324, 147, 148 and 149 of the Indian Penal Code and secondly C.R.No.II- 43/03 filed against the petitioner on 20th March, 2004 for the breach of Sections 4 and 5 of the Bombay Prevention of Gambling Act. The Externing Authority took into consideration five proceedings taken against the petitioner for the breach of peace and apprehended breach of peace and some of them were decided against the petitioner. The Externing Authority also took into consideration three in-camera statements of the witnesses. From the above material, the Externing Authority came to the effective conclusion that the petitioner was headstrong, ferocious and of violent temper. The petitioner was in habit of gambling and was also in habit of threatening and beating the innocent citizens. On account of fear and terror of the petitioner none dared to file any complaint against the petitioner and general public is also harassed by the petitioner. The Externing Authority, therefore, came to the conclusion that why the petitioner should not be removed from the above districts and issued show-cause notice as aforesaid.

4. In reply to the show-cause notice the petitioner tendered his defense in shape of written reply as well as tendered oral evidence. The Externing Authority considered allegations against the petitioner and defense tendered by him and ultimately, vide order dtd.25th August, 2004 came to the conclusion that petitioner should be removed from the above districts to prevent his nefarious activities from the said district.

5. Learned Advocate Mr.Dastoor for the petitioner and learned AGP Ms. Punani for the respondents were heard at length.

6. Out of various grounds urged on behalf of the petitioner to challenge the orders of externment, as opposed and controverted by ld.AGP, it appears, this application can be examined and disposed of on the sole issue the orders in challenge are vitiated on account of non-application of mind on the part of the Externing Authority.

7. On going through the notice it becomes abundantly clear that the said notice is issued under Section 56(a) of the Bombay Police Act, 1951. Such powers are vested in Sub-divisional Magistrate when Sub-divisional Magistrate is satisfied that the movements or acts of any person are causing or calculated to cause alarm, danger or harm to person or property. It is pertinent to note here that Competent Authority can also exercise powers under Section 56(b) of the Bombay Police Act, 1951, when there are reasonable grounds for believing that such person is engaged or is about to be engaged for the commission of an offence involving force or violence or an offence punishable under Chapter 12, 16 and 17 of the Indian Penal Code. The provisions made under Section 56 read with Section 59 of the Bombay Police Act, 1951, it becomes clear that the notice issued under Section 59(1) must make it clear that whether the powers are exercised under Sub-section (a) or (b) of Section 56 of the Bombay Police Act, 1951. This is so because Section 59 of the Bombay Police Act, 1951, enshrines right in favour of proposed externee to explain allegations levelled against him in proposed show-cause notice. The Competent Authority may issue notice under Section 59(1) of the said Act even for both the Sub-sections i.e. Section 56(a) and Section 56(b). But, when the notice is issued exercising powers in any one of these two Sub-sections then the material which the Externing Authority should take into consideration must pertain to the scope of that Sub-section, it may be either Sub-section (a) or Sub-section (b).

8. In the present case, notice is issued under Section 56(a) of the Bombay Police Act, which becomes clear from the first part of the show-cause notice dated 15th of April, 2004. As above said, when action is proposed under sub-section (a) then, material should be about the movements or acts of a person causing or calculating to cause alarm, danger, harm to person or property. As clearly appears from the notice dated 15th April, 2004, the externing authority overstepped the scope of Section 56 (a) and took into consideration materials of Section 56 (b) of the Bombay Police Act, 1951. It is also pertinent to note here that, even within the scope of sub-section (b) of Section 56, the cases or offences under chapter - 12, 16 and 17 could be taken into consideration by the externing authority, while apparently the externing authority has taken into consideration the case filed against the petitioner under the Provisions of Gambling Act and other proceedings taken against the petitioner for the maintenance of breach of peace. Therefore, firstly, non-application of mind reveals on the part of the externing authority in respect of the fact that, while issuing notice under Section 56 (a) of the Bombay Police Act, 1951, the externing authority took into consideration the material of Section 56 (b) of the Bombay Police Act, causing prejudice to the defence of the externee. This non-application of mind to the legal provisions and to material on record renders the order of externment bad in Law and, such an order as confirmed by the appellate authority in a routine manner, also could not be sustained. Therefore, the order passed against the petitioner by the Sub-divisional Magistrate, Surendrangar on 25th of August, 2004, as confirmed by the appellate authority on 16th of March, 2005, both the orders are required to be set aside and quashed on this ground alone.

9. In the result, for the reasons aforesaid, the order dated 25th of August, 2004 passed by the Sub-divisional Magistrate, Surendranagar, in externment case No.22 of 2004 against the petitioner removing him from the above said districts, as well as, the order of the appellate authority confirming the order of the Sub-divisional Magistrate, Surendranagar, both are hereby quashed and set aside. Rule is made absolute. Direct Service is permitted.

(J.R.VORA, J.)
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13.5.2005